

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 3618 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : YES
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

SOHIL SAFI MOHAMMAD VOHRA

Versus

STATE OF GUJARAT

Appearance:

MR KB PANDE for Petitioner

MR ND GOHIL ADDL PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 15/05/2001

ORAL JUDGEMENT

Heard Mr.K.B.Pandey, learned advocate appearing
on behalf of the present petitioner and Mr.N.D.Gohil,
learned APP for respondent - State.

#. In the present petition, the order passed by the Additional Sessions Judge, Nadiad dated 19th April, 2001 in Criminal Misc. Application No. 223 / 2001 is challenged by the present petitioner. The petitioner has filed regular bail application before the Additional Sessions Judge, Nadiad and that application has been rejected while exercising the powers under Section 439 of CrPC, 1973. Mr.Pandey has raised two contentions, of which, the first contention is about consistency in approach by the lower judiciary as relied upon by him in case of S.I.ROOPALAL V. LT GOVERNOR THROUGH CHIEF SECRETARY, DELHI reported in 2000(1) SRJ 354. Mr.Pandey, learned advocate has mainly relied upon para-12 of the said judgment which runs as under :-

"12. We are indeed sorry to note the attitude of the tribunal in this case which, after noticing the earlier judgment of a coordinate Bench and after noticing the judgment of this Court, has still thought it fit to proceed to take a view totally contrary to the view taken in the earlier judgment thereby creating a judicial uncertainty in regard to the declaration of law involved in this case. Because of this approach of the latter Bench of the tribunal in this case, a lot of valuable time of the Court is wasted and the parties to this case have been put to considerable hardship."

#. The second contention which has been raised by learned advocate Mr.Pandey placing reliance upon the decision of this Court reported in 1989 (1) F.A.C. 153 in case of CHANDRAKANT NAGINADAS MODI VS. STATE OF GUJARAT. Mr.Pandey, learned advocate has mainly contended that on verifying the slip, it appears that it was not affixed on the packet containing the muddamal either by gum or sealing wax. If it would have been properly affixed, it could not have been taken out intact. If, therefore, appears that the muddamal was not properly sealed and there was all the possibility of substituting the substance. Coupled with this, the fact that the muddamal remained with the police for more than two months raises a doubt and therefore prosecution has failed to establish the offence beyond reasonable doubt against the appellant.

#. Mr.N.D.Gohil, learned advocate appearing on behalf of the respondent - State has submitted that this is a matter in respect of NDPS Act and therefore while considering the bail application, mandate which has been enshrined under Section 37 of the Act is required to be

kept in mind while exercising the powers by the concerned the Court.

#. However, the provisions of Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 are reproduced hereinbelow :-

"37. Offence to be cognizable and non bailable -

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless -

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor oppose the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

#. However, considering the observations made by Additional Sessions Judge, Nadiad on page 27 in para-3, after perusing the police papers, one fact has been clearly established prima facie and there is reasonable ground to the effect that present petitioner is a person from whom the main accused has purchased Charas. This fact has been born out from the police papers and it has been rightly considered by the concerned Additional Sessions Judge. However, this is a prima facie case established against the present petitioner and a person who is selling Charas in the society and from the police papers, if this has been found on the record that the main accused has purchased Charas from the present petitioner that is enough to consider the mandate of

Section 37 of the NDPS Act and therefore, in such situation, the view taken by the Apex Court in case of UNION OF INDIA VS. IKRAM KHAN reported in AIR 2000 SC 3397, the Apex Court has observed that while considering the question of bail, the Court was not borne in mind the provisions of Section 37 of the NDPS Act which are mandatory in nature and the Court must bear in mind the said provisions before deciding an application of bail in case an accused is facing a trial under the provision of the NDPS Act and in that view of the matter, ultimately bail has been cancelled by the Apex Court which has been granted by the concerned High Court. Thereafter, recently, the Apex Court has also considered the very same question in case of BABUA ALIAS TAZMUL HOSSAI VS. STATE OF ORISSA reported in 2001 AIR SCW 682, where the Apex Court has observed in NDPS Act, bail petition for charge for abetting offence punishable under Section 20(b), 21 and 29, evidence not completely adduced, cannot be said at such stage that accused is not guilty of the offences charged. Moreover, it would be in interest of society to keep the accused involved in activities lethal to society, behind bars and accordingly the petition was dismissed by the Apex Court. In the present case also, learned advocate Mr. Pandey has argued on merits and contended as regards the samples - muddamal that the same has not been properly sealed by the police authority. But so far this contention is concerned, this court is of the opinion that still the trial is yet to be commenced and this contention can be raised by the petitioner before the concerned Court at the time of trial. However, this aspect has been considered by this Court in case of SHIRISH MADHAVDAS PARIKH VS. STATE OF GUJARAT reported in 1990 (1) GLR 617. This court while dealing with the contention raised with regard to production of the petitioner before the Magistrate or Sessions Judge has observed, these are factors to be taken into consideration at the trial and ultimately if the trial court holds that there is some illegality, the Court may not convict the petitioner, but when the question of prima facie case is to be decided, this irregularity on the point of investigation or producing before the Sessions Judge would not be of any avail. It may be mentioned that the said contentions on behalf of the petitioner will be required to be examined from the point of view of Section 36 (d) and also Section 74 of the Act and therefore, at this juncture, it cannot be said that the prosecution has failed to establish a prima facie case.

#. Recently, the Apex Court has also considered the relevant principles which required to be kept in mind by

the concerned Court while considering the anticipatory bail application filed by the accused in case of PRAHLAD SINGH BHATI VS. N.C.T., DELHI AND ANOTHER reported in 2001 AIR SCW 1263 and more particularly in para-8 has observed as under :-

"The jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behavior means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interest of the public or State and similar other consideration. It has also to be kept in mind that for the purpose of granting the bail the Legislature has used kept in mind that for the purpose of granting the bail the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

#. In light of the above observations made by the Apex Court and considering the facts of the present case, according to my opinion, there is prima facie evidence as discussed by the Additional Sessions Judge, Nadiad in para-3 against the present petitioner and therefore, at this juncture, contention which has been raised by the learned advocate Mr.Pandey cannot be considered because the same can be considered by the trial court at the time of trial. However, at the last, Mr.Pandey, learned advocate has relied upon one order passed by the Additional Sessions Judge, Nadiad in favour of Hayatkhan Sardarkhan Pathan passed in Criminal Misc. Application No. 143 / 2001. Considering the order relied by the learned advocate Mr.Pandey, this Court is of the opinion that the order relied is passed by the Sessions Judge and

the same cannot be considered to be binding to the High Court and even the same cannot be considered for the purpose of parity. If the order is passed by the concerned Sessions Judge ignoring the mandate of Section 37 of the NDPS Act, this Court cannot pass such orders on the ground of parity because prima facie, such order is contrary to the mandate of Section 37 of the NDPS Act and therefore even this contention as to claiming parity for identical situation in case with said Hayatkhan Sardarkhan Pathan cannot be of no assistance to the present case. More over, considering the seriousness of the offence committed by the present petitioner of selling contraband articles to the main accused and especially when this fact has been found from the record, prima facie against the present petitioner and it is necessary to note that if the accused released by the Court and his presence in the society adversely affect or having adverse impact in the mind of society and in my opinion, in such peculiar set of facts and circumstances, the present petitioner can not be enlarged on bail otherwise, lethal activities to the society carried out by the petitioner will be repeated which ultimately adversely affects the society as a whole. More over, it is also observed that the present application is preferred under Section 439 of CrPC, 1973 which in fact discretionary powers and while granting the bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behavior, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interest of the public or State and similar other considerations. Moreover, this Court has to keep in mind that for the purposes of granting the bail the Legislature has used the words 'reasonable grounds for believing' instead of 'the evidence' which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. However, it is not excepted, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

#. In the result, in view of above discussed set of facts and circumstances, in my opinion, in such case powers under Section 439 of CrPC, 1973 cannot be granted in favour of the present petition and hence the present

petition is rejected accordingly.

Date : 15-5-2001 [H.K.Rathod, J.]

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